UNIVEIN SDN BHD

v.

MALAYSIA BUILDING SOCIETY BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
ALAUDDIN MOHD SHERIFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: B-02-127-2002]
17 APRIL 2003

CIVIL PROCEDURE: *Stay of execution - Application for stay pending appeal - Whether appeal rendered nugatory should stay order be refused - Whether application financially motivated - Whether order for stay to be granted*

The High Court had granted the respondent's application for an order for sale by public auction regarding three pieces of lands belonging to the appellant. The said lands were charged to the respondent as a security for loan. The appellant had filed an appeal against the said decision and sought for this court to grant a stay of execution pending the said appeal.

The appellant contended that the stay order was necessary as otherwise it would render its appeal nugatory in that the land would be sold and any rights involved would be lost forever. It was also argued that should the said lands be sold based on the present market value, it would fetch a much lower price in light of the Asian economic crisis.

Held:
Per Abdul Aziz Mohamad JCA

[1] Evidence indicated that the appellant would not mind losing the said lands if it received the right price for them. This substantiated the fact that the said lands, being commercial in nature, were of no sentimental value to the appellant. Therefore, this negated the issue of nugatoriness advanced by the appellant. (p 518 d-e)

[2] The balance of convenience tilted heavily in allowing the sale to proceed. The interest, based on the debt owing to the respondent, was escalating at the rate of RM20,000 per day. Based on this fact, the proceeds from the sale of the lands would not even pay half of what the outstanding amount would be. Thus, the respondent ought not be deprived of the fruits of its litigation. Additionally, this would reduce the amount of interest that would otherwise keep accruing. (p 518 g-h)

[3] Assuming the appellant does succeed in the appeal, the loss resulting from the sale could be compensated by the respondent as there was no question that it would be unable to pay the damages. (p 519 a)

[Appellant's application for stay dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Mahkamah Tinggi telah membenarkan permohonan responden untuk menjual melalui lelongan awam tiga bidang tanah yang dimiliki oleh perayu. Tanah-tanah tersebut telah digadaikan kepada responden sebagai sekuriti untuk pinjaman. Perayu telah membuat rayuan terhadap keputusan tersebut dan memohon kepada mahkamah ini untuk suatu perintah penggantungan pelaksanaan sehingga selesai rayuannya.

Perayu menghujah bahawa perintah penggantungan itu perlu bagi mengelakkan rayuannya menjadi sia-sia kerana ia akan melibatkan tanah tersebut dijual dan apa-apa hak ke atasnya akan hilang selamanya. Telah juga diutarakan bahawa sekiranya tanah tersebut dijual berpandukan harga pasaran sekarang, ia akan membawa pulangan yang lebih rendah dengan wujudnya krisis ekonomi di Asia.

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Keterangan menunjukkan bahawa perayu tidak bimbang dengan kehilangan tanah berkenaan sekiranya ia menerima pulangan yang wajar. Ini membuktikan bahawa tanah tersebut, yang bersifat komersial, tidak mepunyai kesan sentimental terhadap perayu. Oleh itu, ini memansuhkan isu kesesiaan yang dihujah oleh perayu.

[2] Imbangan keselesaan lebih tercondong kepada membenarkan jualan tersebut. Jumlah faedah, berasaskan hutang responden, semakin meningkat pada kadar RM20,000 sehari. Berpandukan fakta ini, hasil daripada penjualan tanah tersebut tidak mungkin dapat menghapuskan walaupun setengah daripada jumlah baki hutang. Maka dengan itu, responden tidak seharusnya dinafikan hasil litigasinya. Tambahan pula, ini akan mengurangkan jumlah faedah yang semakin meningkat.

[3] Seandainya perayu berjaya dalam rayuan tersebut, kerugian yang mungkin timbul akibat daripada jualan tersebut boleh ditanggung oleh responden kerana tidak terdapat sebarang keraguan bahawa ia tidak berupaya untuk membayar pampasan berkenaan.

Rayuan perayu untuk penggantungan pelaksanaan ditolak.]

Case(s) referred to:
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 44, 73
National Land Code, s. 256

For the appellant - Teh Meng Teck (Richard WG Lee & Loke Pooi Gee); M/s Cheah Teh & Su
For the respondent - Wong Kian Kheong (Cheah Soo Chuan & Karen Lee Foong Voon); M/s Lee Hishammuddin

[Appeal from High Court, Shah Alam; Originating Summons No: MT4-24-808-1997]

Reported by M Maheswaran

JUDGMENT

Abdul Aziz Mohamad JCA:
The appellant company, having been refused it by the High Court at Shah Alam on 2 December 2002, applied to this court for a stay of execution, pending appeal, of an order given on 7 January 2002 by that High Court for the sale under s. 256 of the National Land Code of three lots of land belonging to them that they had charged to the respondent company as security for loans provided by the respondent company to them. The appeal that is pending is the appellant company's appeal to this court from the order of sale of 7 January 2002.

It was noted that according to the title to the notice of motion by which the application for stay of execution was made to this court, the application was made under s. 44 of the Courts of Judicature Act 1964. That section confers general powers on a single judge of this court to make, in any proceedings pending before this court, incidental directions and interim orders and orders concerning security for costs. In the submissions before us on the stay application, there was some argument as to whether the appropriate section should be s. 44 or s. 73, which is specifically about stay of execution pending appeal to this court. The argument involved references to the observations of this court about s. 44 in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 and had, as its ultimate focus, the question of what an applicant for a stay of execution has to show. But judging the appellants' stay application by the manner in which they sought to justify it in their affidavit, as will be seen after this, to my mind it would not have made any difference to its outcome whether it was an application under ss. 44 or 73.

The statutory sale by public auction had been fixed for 19 February 2003. We heard the stay application on 18 February 2003 and on the same day we dismissed it. These are my grounds for deciding that the application ought to be dismissed.

A few salient facts need first to be set out.

The loans were disbursed in 1995. The total sum disbursed was RM25,800,000. Because the appellants defaulted in the payment of accrued interest amounting to RM3,512,265.79 as at 31 January 1997, in October 1997 the respondents declared that the principal, interest and all other sums payable under the loan agreement were forthwith due and payable. On 1 February 2003, seventeen days before we dismissed the appellants' stay application, the outstanding amount that they owed the respondents was RM71,440,223.50. That amount would keep increasing with the accrual of interest from day to day by an amount of more than RM20,000 a day.

According to a valuation report obtained by the respondents, the three lands that the respondents held as security, which are located in the vicinity of the Kuala Lumpur City Centre, had a market value of RM27,680,000 as at 15 February 2002. That value was adopted by the appellants' counsel in submission.

In para. 15 of their affidavit in support of their application, the appellants claimed that there were special circumstances justifying the grant of a stay of execution. What the appellants meant the special circumstances to be were set out in paras. 14, 16 and 18 of their affidavit. In para. 14 the appellants said to the effect that if stay was not granted and the lands were sold, their appeal would be rendered nugatory or academic even if they finally succeeded in getting the order for sale set aside, and they gave their reason for saying so in para. 16, where they said to the effect that if there was no stay, the lands would be auctioned off and they would lose their rights in them forever. The point about losing the lands appeared again in para. 20 where they argued that the balance of convenience was in favour of granting a stay so that their interest in the lands would be preserved until final disposal of the appeal. It was a point of nugatoriness of appeal.

In para. 18 the appellants presented another point as to special circumstances, which was inconsistent with the nugatoriness point. They said to the effect that if the lands were sold presently, in view of the economic downturn brought about by the Asian economic crisis the lands would fetch a much lower price than their actual market value. It was a fear of financial loss. It was a point of dollars and cents.

A matter disclosed by the appellants' counsel before their other counsel entered upon his actual substantive submission on their stay application on 18 February 2003 convinced me that the point of nugatoriness of appeal was not at all the concern of the appellants and that their real concern was as to dollars and cents, which concern they expressed in para. 18 of their affidavit. What counsel informed the court was that someone had made a formal offer to buy the lands by private treaty for RM30,500,000, which counsel said was RM4,000,000 more than the reserve price for the auction, and that the offer had been communicated by the appellants' solicitors to the respondents' solicitors on 14 February but that a few minutes ago he had been informed by the respondents' solicitors that the respondents' instructions were to proceed with the auction that had been fixed for the next day, 19 February. The appellants' other counsel thereupon embarked on his submission for a stay of execution.

It was not clear to me why the appellants' counsel made the disclosure. The matter disclosed certainly did not enter into the substantive submission on stay of execution. It was, however, obvious to me from the disclosure that the appellants would not mind losing the lands if they got the right price for them. The respondents had therefore been right in saying in para. 17 of their affidavit in reply that the lands were commercial property of no sentimental value to the appellants.

That being the case, to my mind the point of nugatoriness and any submission about it did not have to be considered.

That left to be considered only the question of dollars and cents from the point of view of what the appellants' counsel called balance of convenience and the respondents' counsel called balance of justice. It was obvious to me that the balance tilted heavily in favour of allowing the sale to proceed. From RM25,800,000 in 1995, the debt had now mounted to RM71,440,223.50. If the lands were not sold now, but sold only after the disposal of the appeal should the appellants fail in the appeal, with interest accruing daily at more than RM20,000 per day, the total outstanding would keep increasing to an amount that would depend on when the appeal would be decided. At RM20,000 per day, interest per year would come to a region of RM7,000,000. The proceeds of sale of the lands would not pay even half of what the outstanding amount would be then. It would be worse if, depending on the economic situation then, the lands should fetch a lower value than their present market value. As to the balance, the respondents might not be able to recover it at all. The respondents should not be deprived of the fruit of their litigation. They should be allowed to recover now whatever amount they could from the lands. Apart from enabling them to enjoy some fruit from their litigation, that would reduce the amount of the interest that would otherwise keep accruing.

On the other hand, if the lands were sold now and the appellants should succeed in the appeal, any loss that they might sustain from the sale of their lands could be compensated for by the respondents with damages based on the commercial value of the lands. There was no question that the respondents would not be able to pay the damages.

For those reasons, I saw no justification for a stay of execution and the application had to be dismissed.

My learned brothers, Denis Ong and Alauddin JJCA, have had an opportunity of reading these grounds in draft and have expressed their concurrence with it.